

Request for Proposals

Solicitation Number F09650-90-R-0207
West Robins Housing Privatization Project, UHHZ 974012

APPENDIX G: INTER-CREDITOR AGREEMENT

Robins AFB

INTERCREDITOR AGREEMENT

THIS INTERCREDITOR AGREEMENT (this "Intercreditor Agreement") is made and entered into as of _____, 199__, by and among **THE UNITED STATES OF AMERICA represented by THE SECRETARY OF THE AIR FORCE** (the "Secretary"); **[NAME OF GUARANTEED LENDER]**, a _____ (the "Guaranteed Lender"); and **[NAME OF BORROWER]**, a _____ (the "Borrower").

RECITALS

A. The Borrower and the Secretary have entered into one or more Project Documents (as defined in the Guaranty Agreement) pursuant to which the Borrower is obligated for the design, construction, operation, maintenance, replacement and rehabilitation, as applicable, of a privately-owned rental housing development (the "Project") primarily for use by military personnel and their families assigned to Robins AFB, Warner Robins, Georgia (the "Installation").

B. In connection with the Project, the Guaranteed Lender has agreed to make a first lien mortgage loan to the Borrower in the original principal amount of \$_____ (the "Guaranteed Loan") and the Secretary has agreed to make a subordinate mortgage loan to the Borrower in the original principal amount of \$_____ (the "Direct Loan").

C. The Guaranteed Loan and the terms and provisions of the Guaranteed Loan Documents shall be superior in priority to the Direct Loan and the terms and provisions of the Direct Loan Documents.

D. The parties desire to execute this Intercreditor Agreement in order to establish certain rights and responsibilities among the parties, to coordinate their financing arrangements, and to confirm certain agreements with respect to procedures for approvals, inspections, documentation, subordination and other matters in connection with the Loans.

NOW, THEREFORE, in consideration of the above recitals and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. **Definitions.** The terms defined in this Section 1 and in the Recitals (except as herein otherwise expressly provided or unless the context otherwise requires) for all purposes of this Intercreditor Agreement shall have the respective meanings specified in this Section 1 and the Recitals. Any capitalized terms used herein which are not expressly defined in this Intercreditor Agreement shall have the meanings set forth in the Guaranty Agreement.

"Authorized Representative" means with respect to all parties, an officer, a principal, an agent or other person who is authorized to act on behalf of and whose actions are binding upon that party. As of the date of execution of this Intercreditor Agreement, the primary Authorized Representative (A) of the Borrower is _____; (B) of the Guaranteed Lender is _____; and (C) of the Secretary is _____. Any party may designate additional or substitute persons to act as an Authorized Representative on its behalf at any time by a written notice to the other parties.

"Borrower" means _____, a _____, or any of its successors or assigns which are approved as the owner of the Project by the Secretary.

"Direct Loan" means the loan made by the Secretary to the Borrower in the original principal amount of \$_____ which is subordinate to the lien of the Guaranteed Loan.

"Direct Loan Documents" means the note, the security instrument and any related documents, as they may be amended or modified in accordance with their terms, evidencing or securing the obligations of the Borrower and Secretary with respect to the Direct Loan.

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"Guaranteed Lender" means [NAME OF GUARANTEED LENDER] and its successors and permitted assigns.

"Guaranteed Loan" means the first lien mortgage loan in the original principal amount of \$_____ from the Guaranteed Lender to the Borrower.

"Guaranteed Loan Documents" means the note, the security instrument and any related documents, as they may be amended or modified in accordance with their terms, evidencing or securing the obligations of the Borrower and Guaranteed Lender with respect to the Guaranteed Loan.

"Guaranty Agreement" means the Military Housing Loan Guaranty Agreement of even date with this Intercreditor Agreement by and between the Secretary and the Guaranteed Lender as amended or modified in accordance with its terms.

"Installation" means Robins AFB, Warner Robins, Georgia.

"Intercreditor Agreement" means this intercreditor agreement, as amended or modified in accordance with its terms.

"Lenders" means collectively, the Guaranteed Lender and the Secretary.

"Loan Documents" means collectively, the Guaranteed Loan Documents and the Direct Loan Documents.

"Loans" means collectively, the Guaranteed Loan and the Direct Loan.

"Secretary" means the Secretary of the Air Force or his Authorized Representative.

"Selected Proposal" means the proposal prepared by or behalf of the Borrower, and selected by the Secretary as the winning proposal in response to the Solicitation, including any and all amendments. For purposes of this Intercreditor Agreement, Selected Proposal shall be deemed to include the Final Plans, the final construction schedule, the Construction Management Plan, the Operations and Maintenance Plan, and the Management Plan submitted by the Borrower and approved by the Secretary in accordance with the Solicitation.

"Solicitation" means United States Department of the Air Force Solicitation Number F09650-98-R-0207, including any and all amendments.

2. **Borrower's Compliance.** The Borrower agrees to borrow the Loans and to apply the proceeds of the Loans as required under and in compliance with the terms and conditions of the Loan Documents. The Borrower represents and warrants to the Lenders that neither the Borrower nor the Project is in breach, violation or default under any of the Loan Documents or any other document or agreement by which the Borrower or the Project is or may be bound, and no event or circumstance has occurred or exists which would constitute such a breach, violation or default with notice or the passage of time or both.

3. **Representations of Lenders.**

a. The Guaranteed Lender has delivered to the Secretary complete and accurate copies of all of the Guaranteed Loan Documents described in Exhibit B. The Guaranteed Loan Documents so delivered: (i) are all of the documents executed by the Guaranteed Lender and Borrower in connection with the Guaranteed Loan, (ii) have not been amended or modified, and (iii) constitute the entire understanding between the Guaranteed Lender and the Borrower with respect to the Guaranteed Loan. To the best of the Guaranteed Lender's knowledge, no default exists under the terms of any of the Guaranteed Loan Documents.

b. The Secretary has delivered to the Guaranteed Lender complete and accurate copies of all of the Direct Loan Documents described in Exhibit C. The Direct Loan Documents so delivered: (i) are all of

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the documents executed by the Secretary and Borrower in connection with the Direct Loan, (ii) have not been amended or modified, and (iii) constitute the entire understanding between the Secretary and the Borrower with respect to the Direct Loan. To the Secretary's knowledge, no default exists under the terms of any of the Direct Loan Documents.

4. Subordination.

a. Subject to the terms and conditions of this Intercreditor Agreement, the lien, operation and effect of the Direct Loan Documents are hereby fully subordinated to the lien, operation and effect of the Guaranteed Mortgage and shall at all times until the Guaranteed Loan is paid in full be and remain inferior to the Guaranteed Mortgage; provided, however, the Direct Loan shall not be subordinated to the extent any increase, modification, replacement or extension of the Guaranteed Loan is not accomplished in accordance with this Intercreditor Agreement.

b. The Secretary intentionally subordinates the lien of the Direct Loan Documents and the debt evidenced and secured thereby in favor of the Guaranteed Lender and understands that in consideration of this subordination, specific loans are being made to the Borrower by the Guaranteed Lender that would not have been made but for reliance upon this subordination.

5. Application of Project Income; Lockbox Agreement.

a. The Guaranteed Lender, the Secretary and the Borrower shall enter into a Lockbox Agreement or other similar agreement in form and substance satisfactory to the Secretary which governs the receipt and disbursement of all rents, revenues and other income from the Project ("Project Income"). Among other provisions, the Lockbox Agreement shall specifically provide for the application of Project Income in the following order of priority:

(1) Reasonable and necessary operating expenses of the Project (including, without limitation, expenses incurred for the preparation of statements, schedules, reports and other information required by the Secretary), exclusive of payments under the Loans, in accordance with an annual budget for the Project approved by the Guaranteed Lender and the Secretary; provided that for purposes of the Lockbox Agreement, operating expenses of the Project shall not include management fees paid to the Borrower or any party which is affiliated with or having an identity-of-interest with the Borrower or any of its principals.

(2) Extraordinary expenses of the Project as approved by the Secretary.

(3) Monthly deposits for taxes, insurance premiums, and the reserve for replacements required to be made by the Borrower.

(4) Scheduled monthly payments of principal and interest due under the Construction Loan or Guaranteed Loan, as applicable.

(5) Deposits into the Construction Escrow Account (as defined in the Solicitation), during the applicable period in accordance with the Solicitation.

(6) Scheduled monthly payments of principal and interest due under the Direct Loan.

(7) Any payment needed to restore the balance of the Performance Deposit (as defined in the Solicitation) in accordance with the terms of the Solicitation.

(8) Scheduled deposits into or any payment needed to restore the balance of the Reinvestment Account (as defined in the Solicitation) in accordance with the terms of the Solicitation and the Selected Proposal.

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(9) **[Add any other escrows or deposits required by amended Solicitation or provided for in the Selected Proposal]**

(10) Management fees paid to the Borrower or any party which is affiliated with or having an identity-of-interest with the Borrower of any of its principals, if applicable.

(11) Balance, if any, to the Borrower.

6. **Notice of Default; Right to Cure.** Each Lender will promptly notify the other of any defaults under its Loan of which such Lender becomes aware, including without limitation, providing copies to the other Lender of any and all default notices sent to the Borrower concurrently with the delivery of same to the Borrower. The Lender under the non-defaulted Loan shall have the right, but not the obligation, exercisable in its sole discretion (and, in the case of the Secretary, subject, if required, to the receipt of an additional appropriation of funds or legislative authority) to cure such default, and will be provided a cure period which is thirty (30) days beyond the cure period given to the Borrower under the terms of the applicable Loan Documents (or in those cases in which the Borrower is not provided any cure period, the applicable Lender shall have a cure period of thirty (30) days) in which to cure the default. Each Lender agrees that it will not take any action to enforce its security interest in the Project unless and until it has first provided the required written notice of default to the other Lender and the Lender receiving (or entitled to receive) such notice has not cured such default within the applicable cure period. If a Lender shall effect a cure of a Borrower's default (including without limitation, the payment by the Secretary to the Guaranteed Lender of Monthly Shortfall Payments in accordance with the Guaranty Agreement), the Lender under the previously defaulted Loan shall not have the right to accelerate such Loan or to exercise any other default and foreclosure rights under its Loan Documents.

7. **Borrower's Agreement to Reimburse Lenders.** If there is a default under a Loan, either Lender shall have the right, but not the obligation, to take whatever action it deems necessary or appropriate to protect its interest in its Loan and its interest in the security given under its Loan Documents, including without limitation, curing any default by the Borrower under either or both Loans. If a Lender expends any sums in connection with or arising out of any default or alleged default by the Borrower under either Loan, including without limitation, sums paid to the holder of a defaulted Loan, or any other party, to cure the Borrower's default, Borrower agrees:

(a) to be liable to the Lender for (i) any and all such sums, together with interest on such sums from and after the date they are incurred to the date of repayment at the default rate set forth in the Loan Documents, or if no such default rate is contained in the Loan Documents, at the rate of 4% per annum above the normal interest rate set forth in the applicable Loan Documents and (ii) all fees and expenses of Lender's counsel incurred in connection with such actions;

(b) that all amounts due to the Lender under (a) above, shall constitute additional indebtedness of the Borrower to the Lender, the payment of which shall be secured by the Loan Documents; and

(c) any such amounts will be due and payable by Borrower to the Lender immediately following Lender's demand.

8. **Secretary's Option To Act Under Direct Loan Documents For Defaults Under the Guaranteed Loan or Direct Loan.**

a. All defaults under the Guaranteed Loan shall constitute and be events of default under the Direct Loan. With respect to defaults under the Guaranteed Loan which remain uncured at the expiration of the cure period provided to the Secretary in Section 6, the Guaranteed Lender agrees that the Secretary shall have the right, but not the obligation, at its sole option, to exercise any and all of the Secretary's rights and remedies under the Direct Loan with respect to such uncured default.

b. Notwithstanding that defaults under the Direct Loan may constitute and be events of default under the Guaranteed Loan, if any default under the Direct Loan shall remain uncured at the expiration of

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the cure period provided to the Guaranteed Lender in Section 6, the Guaranteed Lender agrees that the Secretary shall have the right, but not the obligation, at its sole option, to exercise any and all of the Secretary's rights and remedies under the Direct Loan with respect to such uncured default. The Guaranteed Lender further agrees that if the Secretary elects within thirty (30) days of the end of such cure period to exercise its remedies under the Direct Loan, the Guaranteed Lender shall forebear in the exercise of any of its rights and remedies under the Guaranteed Loan Documents which arise solely as a result of the default under the Direct Loan and the cross-default provisions, if any, of the Guaranteed Loan Documents; provided, however, that nothing in this subsection shall prevent the Guaranteed Lender from exercising any of its rights and remedies under the Guaranteed Loan Documents relating to an independent default under the Guaranteed Loan subject to the terms of the Guaranty Agreement and other provisions of this Intercreditor Agreement.

c. Acquisition of the Project whether by the Secretary or another party by foreclosure, deed-in-lieu of foreclosure, sale or other disposition of the Project pursuant to the exercise of the Secretary's rights and remedies under the Direct Mortgage shall be subject to the Guaranteed Loan Documents. Any proceeds resulting from a foreclosure, deed-in-lieu of foreclosure, sale or other disposition of, or realization upon, the Project under the Direct Mortgage or other security agreements or any other interest in the Project pursuant to action taken by the Secretary shall be distributed in accordance with Section 12.

9. **Amendment of Guaranteed Loan Documents.** The Guaranteed Lender and Borrower hereby agree that they will not amend or modify, or consent to any amendment or modification of, the Guaranteed Loan or any of the documents evidencing or securing the Guaranteed Loan without the prior written consent of the Secretary in accordance with the Guaranty Agreement. Any modification or amendment of the terms of the Guaranteed Loan not made in accordance with the terms and conditions of this Intercreditor Agreement and the Guaranty Agreement, shall at the option of the Secretary, be deemed to be null and void.

10. **Amendment of Direct Loan Documents.** The Secretary shall not amend or modify, or consent to any amendment or modification of, the Direct Loan or any of the documents evidencing or securing the Direct Loan without the prior written consent of the Guaranteed Lender, if such proposed amendment or modifications would materially and adversely affect the interests of the Guaranteed Lender.

11. **Insurance Proceeds.** The Secretary and Guaranteed Lender agree that any insurance proceeds received as a result of casualty loss to the Project received in connection with the Project shall be applied in accordance with the terms and conditions of the Ground Lease.

12. **Distributions of Proceeds of Collateral.** The proceeds resulting from any foreclosure, sale or other disposition of, or realization upon, the Project under any of their mortgages or other security agreements or any other interest in the Project, or any part thereof, shall be distributed first to the Guaranteed Lender until all obligations of the Borrower to the Guaranteed Lender under the Guaranteed Loan Documents are paid and performed in full, and any remaining proceeds shall be paid to the Secretary, until all obligations of the Borrower to the Secretary under the Direct Loan Documents are paid and performed in full, with any excess being distributed to the Borrower.

13. **Lenders' Standard of Care.** The Secretary's actions and omissions pursuant to this Intercreditor Agreement shall not result in any liability on the part of the Secretary to the Guaranteed Lender, for performance or responsibility for any certain standard of care, and the Guaranteed Lender expressly waives all claim against the Secretary for damages caused by any such action or omission by the Secretary for performance or responsibility. Guaranteed Lender's actions and omissions pursuant to this Intercreditor Agreement shall not result in any liability on the part of Guaranteed Lender to the Secretary, for performance or responsibility for any certain standard of care, and the Secretary expressly waives all claim against the Guaranteed Lender for damages caused by any such action or omission by the Guaranteed Lender for performance or responsibility. The agreements contained in the preceding two sentences do not extend to claims for damages caused by the gross negligence or willful misconduct of officers, agents or employees of the Secretary of Guaranteed Lender, as applicable, without contributory fault on the part of any other person, firm, entity or party.

14. **Termination.** This Intercreditor Agreement shall in all respects be a continuing agreement and

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shall remain in full force and effect until the earlier of the payment in full of the Guaranteed Loan or the Direct Loan. Upon such payment in full, this Intercreditor Agreement shall automatically terminate; provided that the parties agree to each execute such instruments as may be reasonably requested by any party to further evidence such termination.

15. **Consent by the Borrower.** The Borrower is executing this Intercreditor Agreement to evidence its consent to its terms.

16. **Conflicts.** Between the Lenders, in the event of a conflict between any provision of this Intercreditor Agreement and any provision of any of the Guaranteed Loan Documents, and the Direct Loan Documents, the provisions of this Intercreditor Agreement shall control.

17. **Interpretation.** The words "hereof," "herein," and other words of similar import refer to this Intercreditor Agreement as a whole. Words of the masculine gender shall be deemed and construed to include correlative words of the feminine and neuter genders. Words importing the singular number shall include the plural number and vice versa unless the context shall otherwise indicate. References to sections, subsections, and provisions are to the applicable sections, subsections and provisions of this Intercreditor Agreement as originally executed. The headings of this Intercreditor Agreement are for convenience only and shall not define or limit its provisions.

18. **Delay or Omission Not Waiver.** No delay or omission of the Guaranteed Lender or of the Secretary to exercise any right or remedy provided under this Intercreditor Agreement upon a default of the other party (except a delay or omission pursuant to a written waiver) shall impair any such right or remedy or constitute a waiver of any such default or acquiescence therein. Every right and remedy given by this Intercreditor Agreement or by law to such party may be exercised from time to time, and as often as may be deemed expedient by such party.

19. **Performance of Obligations.** Each party hereby covenants to keep and perform faithfully all of its covenants and undertakings contained in this Intercreditor Agreement.

20. **Assignment; No Third Party Beneficiaries.** The rights, title and interest of the Guaranteed Lender in, to and under the Guaranteed Loan and the rights and obligations of the Guaranteed Lender under this Intercreditor Agreement shall only be transferred in accordance with the terms and conditions of the Guaranty Agreement which govern transfer of the Guaranteed Loan. There shall be no third party beneficiaries of this Intercreditor Agreement and the Secretary shall have no obligation to recognize or deal with any party other than the Guaranteed Lender (or its servicer on behalf of the Guaranteed Lender) or the Borrower with respect to rights, benefits, and obligations of the Guaranteed Lender, the Borrower and the Secretary under this Intercreditor Agreement.

21. **Amendment.** The Secretary and the Guaranteed Lender hereby covenant and agree that this Intercreditor Agreement shall be amended only by an instrument in writing executed by their duly Authorized Representatives.

22. **No Individual Liability.** No covenant or agreement contained herein shall be deemed to be the covenant or agreement of any individual officer, agent, employee or representative of the Secretary, in his or her individual capacity and none of such persons shall be subject to any personal liability or accountability by reason of the execution of this Intercreditor Agreement, whether by virtue of any constitution, statute or rule of law or by the enforcement of any assessment or penalty, or otherwise.

23. **Notices.**

Any notice, request, complaint, demand, communication or other paper required or permitted to be delivered to the Guaranteed Lender or the Secretary, shall be sufficiently given and shall be deemed given (unless another form of notice shall be specifically set forth herein) on the Business Day following the date on which such notice or other communication shall have been delivered to a national overnight delivery service

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(receipt of which to be evidenced by a signed receipt from such overnight delivery service) addressed to the appropriate party at the addresses set forth below. The Guaranteed Lender and the Secretary may, by notice given as provided in this paragraph, designate any further or different address to which subsequent notices or other communication shall be sent.

The Guaranteed
Lender:

The Borrower:

The Secretary:

with a copies to:

24. **Governing Law.** This Intercreditor Agreement shall be construed, and the rights and obligations of the Secretary, and the Guaranteed Lender under this Intercreditor Agreement shall be determined, in accordance with the laws of the State of Georgia.

25. **Severability.** If any provision of this Intercreditor Agreement shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining portions shall not in any way be affected or impaired. In case any covenant, stipulation, obligation or agreement of the Secretary contained herein shall for any reason be held to be in violation of law, then such covenant, stipulation, obligation or agreement shall be deemed to be the covenant, stipulation, obligation or agreement of the Secretary to the full extent permitted by law.

26. **Multiple Counterparts.** This Intercreditor Agreement may be executed in multiple counterparts, all of which shall constitute one and the same instrument and each of which shall be, and shall be deemed to be, an original.

IN WITNESS WHEREOF, the parties have executed this Intercreditor Agreement as of the date first above written.

[NAME OF GUARANTEED LENDER]

By: _____
Name: _____
Title: _____

[ADD ACKNOWLEDGEMENT]

[Signatures Continue on Following Page]

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THE SECRETARY OF THE AIR FORCE

By: _____
Name: _____
Title: _____

[ADD ACKNOWLEDGEMENT]

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The undersigned Borrower is executing this Intercreditor Agreement for the purposes of acknowledging that the Loans are subject to its terms and conditions.

[NAME OF BORROWER]

By: _____
Name: _____
Title: _____

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EXHIBIT A

Property Description

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EXHIBIT B

List of Guaranteed Loan Documents

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EXHIBIT C

List of Direct Loan Documents